

2003

Robert L. Malan v. Kevin Gates : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ROBERT L. MALAN

Petitioner-Appellee,

v.

KEVIN GATES

Respondent-Appellant.

Case No. 20030922-CA

BRIEF OF APPELLANT

APPEAL FROM FINAL JUDGMENT AND ORDER GRANTING
CIVIL STALKING INJUNCTION AGAINST KEVIN GATES, THE
HONORABLE BRUCE C. LUBECK PRESIDING IN THE THIRD
JUDICIAL DISTRICT COURT, SUMMIT COUNTY, STATE OF UTAH

ORAL ARGUMENT IS REQUESTED

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Rebecca Stann

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STATEMENT OF JURISDICTION

Under Utah Code Annotated section 78-2-2(3)(j), the Utah Supreme Court is granted jurisdiction over the orders of any court of record over which the Court of Appeals does not have original appellate jurisdiction. This Court has jurisdiction over cases transferred from the Utah Supreme Court, pursuant to Utah Code Annotated section 78-2a-3(2)(j).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

A. **Issue:** Did the trial court err in allowing Mr. Malan to testify about the technical workings of a particular cellular telephone that he did not own and did not program?

Standard of Review: An appellate court will overturn a trial court's finding that there was a proper foundation for the admission of evidence when an abuse of discretion is shown. *State v. Torres*, 69 P.3d 314, 316 (UT App 2003).

Preservation: The issue concerning a proper foundation for Mr. Malan's testimony was preserved during oral argument at the October 7, 2003 civil stalking injunction hearing. R. 77:14-15, 19 (attached as Addendum B).

B. **Issue:** Did the trial court err in allowing Mr. Malan, rather than an expert, to testify about the specific manner in which a cellular telephone receives digital text messages?

Standard of Review: A reviewing court will reverse the trial court's determination regarding the admissibility of expert testimony when there is a clear abuse of discretion. *State v. Kelly*, 1 P.3d 546, 549 (Utah 2000).

Preservation: The issue concerning Mr. Malan's qualifications, and his ability to testify about the manner in which cellular telephones receive text messages, was preserved during oral argument at the October 7, 2003 civil stalking injunction hearing. R. 77:14-15.

RELEVANT PROVISIONS

A. Utah Rule of Evidence 602

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

B. Utah Rule of Evidence 702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

STATEMENT OF THE CASE

Kevin Gates appeals the district court's issuance of a civil stalking injunction that enjoins him from contacting Robert Malan and his children, Brynlynn Malan, Jaden Malan, Cache Malan and Cardon Malan, as well as Robert Malan's employer, Novartis. On October 7, 2003, Mr. Malan testified at an evidentiary hearing on the underlying civil stalking injunction. At the hearing, Mr. Malan was allowed to testify, over defense counsel's objection, about a threatening text message received on his girlfriend's cellular telephone that was allegedly directed toward him and sent by Mr. Gates. Based on the

testimony regarding the text message, Judge Lubeck found that there was a “course of conduct,” as defined in Utah Code Annotated section 76-5-106.5(1)¹, and consequently issued the civil stalking injunction. The Notice of Appeal was subsequently filed on November 6, 2003.

STATEMENT OF FACTS

1. On September 11, 2003, Mr. Malan and his girlfriend, Allison Harrington, went to the latter’s residence to gather some personal belongings in preparation for an out-of-town trip. R. 77:9.
2. Ms. Harrington is, and was at all relevant times herein, an employee of Mr. Gates, and her residence is owned by Mr. Gates, although not occupied by him. R. 77:3, 9-10.
3. Shortly after Mr. Malan and Ms. Harrington arrived at the latter’s residence, Mr. Gates and a friend, Albert Romero, also arrived there. R. 77:9.
4. Based on past experiences and conflicts between Mr. Gates and Mr. Malan, Mr. Gates and Mr. Romero allegedly threatened and assaulted Mr. Malan on the driveway and in the front yard of the residence. R. 77:10-13.
5. After some neighbors told Mr. Gates and Mr. Romero that they were going to call the police, the two men drove away. R. 77:13.

¹ See Addendum A for a complete copy of Utah Code Annotated section 76-5-106.5.

6. Mr. Gates and Mr. Romero were arrested by Park City police officers shortly thereafter and were taken to jail. R. 77:13-14.

7. Shortly after the aforementioned incident, and while Mr. Malan and Ms. Harrington were filling out witness statements and a petition for an ex parte civil stalking injunction, a text message appeared on Ms. Harrington's cellular telephone. The message read, in essence and in relevant part, "that was his warning." R. 77:15, 24.

8. Mr. Malan testified at the civil stalking injunction hearing that the aforementioned text message was directed toward him, and was sent by Mr. Gates. R. 77:14-15.

9. Defense counsel objected to Mr. Malan's testimony based on lack of foundation. R. 77:19.

SUMMARY OF THE ARGUMENT

The district court erred in allowing Mr. Malan to testify about a digital text message received on a cellular telephone that he does not own and did not program. Moreover, the district court erred by admitting Mr. Malan's testimony about the specific manner in which cellular telephones receive text messages, and the source of those messages.

Mr. Malan is not the owner of the cellular telephone used herein. Consequently, he has no personal knowledge of the phone's programming and can not competently testify about a particular name or telephone number previously programmed into the

phone. Mr. Malan's testimony in this respect violated Utah Rule of Evidence 602 and should not be used to support the civil stalking injunction.

Mr. Malan also gave "expert" testimony, for which he is unqualified, regarding digital text messages and their source. Because this issue is not within the knowledge of the average trier of fact, expert testimony is required. However, Mr. Malan is not, and never claimed to be, an expert on cellular telephones or any other communication device. Thus, his testimony regarding the source of the text message received on Ms. Harrington's telephone violated Utah Rule of Evidence 702 and should not have been admitted and used to support the underlying civil stalking injunction.

ARGUMENT

I. The District Court Erred By Admitting, Without the Requisite Foundation, Mr. Malan's Testimony Regarding a Cellular Telephone With Which He Had No Personal Knowledge

Utah Rule of Evidence 602 prohibits a witness from testifying about a matter "unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Interpreting this rule, the Utah Court of Appeals stated that it "requires that the witness have the opportunity and the capacity to perceive the events in question." *State v. Villarreal*, 857 P.2d 949, 956 (Utah Ct. App. 1993) (quotation and citation omitted).

This Court should find that Mr. Malan failed to lay an appropriate foundation for his testimony regarding Ms. Harrington's cellular telephone and the text message received on it. Based simply on common sense, the trial court found that an appropriate

foundation for Mr. Malan's testimony had been given. R. 77:23-24. At no time during the hearing did Mr. Malan claim to be the owner of the phone, or to have been the person that programmed the phone. R. 77:23. In fact, he never even claimed to be particularly familiar with Ms. Harrington's cellular phone. Absent such foundation, his testimony concerning the correlation of a text message with a previously-programmed telephone number or a previously-programmed name for a specific individual is inadmissible. R. 77: 15, 17-19. This Court should find that the trial court abused its discretion by admitting such testimony, in violation of Utah Rule of Evidence 602.

II. The District Court Erred By Allowing Mr. Malan to Testify as an Expert Regarding the Technical Method By Which a Cellular Telephone Receives Text Messages

Utah Rule of Evidence 702 provides

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Furthermore, in interpreting Utah Rule of Evidence 702, the Utah Court of Appeals has determined that whether or not expert testimony is required depends on whether or not the matter "is within the knowledge of the average trier of fact." *State v. Payne*, 964 P.2d 327, 332 (Utah Ct. App. 1998) (quotation and citation omitted).

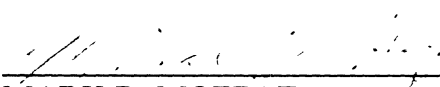
The trial court found that Mr. Malan's testimony had a sufficient foundation (R. 77: 23-24) and that, based on Mr. Malan's description of text messaging (R. 77:15, 18-19), the message had come from Mr. Gates. This Court should find that Mr. Malan's

testimony was “expert” in nature, and that Mr. Malan is not qualified as an expert on cellular telephones or text messaging. To establish the source of the allegedly threatening text message, Mr. Malan testified to the method by which text messages are sent to cellular telephones. R. 77:15, 18-19. Most importantly, Mr. Malan concluded, based on his own analysis, that the allegedly threatening text message was sent by Mr. Gates, and that although it was received on Ms. Harrington’s phone, it was directed toward him. R. 77: 15, 18, 19. How text messaging is effectuated, and how the source of such messages is identified, is beyond the knowledge of the average trier of fact, and therefore requires expert testimony. Mr. Malan never claimed to be such an expert, and, as a pharmaceutical representative, he possesses no more expertise in this area than any other average citizen. Consequently, this Court should find that the trial court clearly abused its discretion by allowing Mr. Malan to testify, as an expert, to the source of the text message sent to Ms. Harrington’s cellular telephone.

CONCLUSION

Based on the foregoing, this Court should find that Mr. Malan’s testimony related to the text message and its source was inadmissible under Utah Rules of Evidence 602 and 702, and should therefore order that the underlying civil stalking injunction be reconsidered without such testimony.

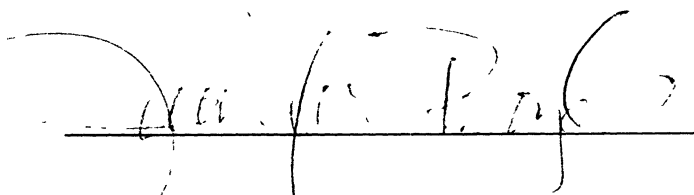
DATED this 5 day of February, 2004.



MARK R. MOFFAT
MICHAEL T. HOLJE
Attorneys for Kevin Gates

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Brief of Appellant was mailed, postage prepaid, to Robert L. Malan, 2128 East Lorita Way, Sandy, Utah 84093, on the 5 day of February, 2004.



MTH/P/90

ADDENDA

Addendum A: Utah Code Ann. § 76-5-106.5

Addendum B: Transcript of Civil Stalking Injunction Hearing held on
October 7, 2003

ADDENDUM A

76-5-106.5 Definitions --Stalking --Injunction --Hearing.

(1) As used in this section:

(a) "Course of conduct" means repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person.

(b) "Immediate family" means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who regularly resided in the household within the prior six months.

(c) "Repeatedly" means on two or more occasions.

(2) A person is guilty of stalking who:

(a) intentionally or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person:

(i) to fear bodily injury to himself or a member of his immediate family; or

(ii) to suffer emotional distress to himself or a member of his immediate family;

(b) has knowledge or should have knowledge that the specific person:

(i) will be placed in reasonable fear of bodily injury to himself or a member of his immediate family; or

(ii) will suffer emotional distress or a member of his immediate family will suffer emotional distress; and

(c) whose conduct:

(i) induces fear in the specific person of bodily injury to himself or a member of his immediate family; or

(ii) causes emotional distress in the specific person or a member of his immediate family.

(3) A person is also guilty of stalking who intentionally or knowingly violates a stalking injunction issued pursuant to Title 77, Chapter 3a, Stalking Injunctions, or intentionally or knowingly violates a permanent criminal stalking injunction issued pursuant to this section.

(4) Stalking is a class A misdemeanor:

(a) upon the offender's first violation of Subsection (2); or

(b) if the offender violated a stalking injunction issued pursuant to Title 77, Chapter 3a, Stalking Injunctions.

(5) Stalking is a third degree felony if the offender:

(a) has been previously convicted of an offense of stalking;

(b) has been convicted in another jurisdiction of an offense that is substantially similar to the offense of stalking;

(c) has been previously convicted of any felony offense in Utah or of any crime in another jurisdiction which if committed in Utah would be a felony, in which the victim of the stalking or a member of the victim's immediate family was also a victim of the previous felony offense; or

(d) violated a permanent criminal stalking injunction issued pursuant to Subsection (7).

(6) Stalking is a felony of the second degree if the offender:

(a) used a dangerous weapon as defined in Section 76-1-601 or used other means or force likely to produce death or serious bodily injury, in the commission of the crime of stalking;

(b) has been previously convicted two or more times of the offense of stalking;

(c) has been convicted two or more times in another jurisdiction or jurisdictions of offenses that are substantially similar to the offense of stalking;

(d) has been convicted two or more times, in any combination, of offenses under Subsection (5); or

(e) has been previously convicted two or more times of felony offenses in Utah or of crimes in another jurisdiction or jurisdictions which, if committed in Utah, would be felonies, in which the victim of the stalking was also a victim of the previous felony offenses.

(7) A conviction for stalking or a plea accepted by the court and held in abeyance for a period of time shall operate as an application for a permanent criminal stalking injunction limiting the contact of the defendant and the victim.

(a) A permanent criminal stalking injunction shall be issued without a hearing unless the defendant requests a hearing at the time of the verdict, finding, or plea of guilty, guilty and mentally ill, plea of no contest, or acceptance of plea in abeyance. The court shall give the defendant notice of his right to request a hearing.

(i) If the defendant requests a hearing, it shall be held at the time of the verdict, finding, or plea of guilty, guilty and mentally ill, plea of no contest, or acceptance of plea in abeyance unless the victim requests otherwise, or for good cause.

(ii) If the verdict, finding, or plea of guilty, guilty and mentally ill, plea of no contest, or acceptance of plea in abeyance was entered in a justice court, a certified copy of the judgment and conviction or a certified copy of the court's order holding the plea in abeyance must be filed by the victim in the district court as an application and request for hearing for a permanent criminal stalking injunction.

(b) A permanent criminal stalking injunction may grant the following relief:

(i) an order restraining the defendant from entering the residence, property, school, or place of employment of the victim and requiring the defendant to stay away from the victim and members of the victim's immediate family or household and to stay away from any specified place that is named in the order and is frequented regularly by the victim; and

(ii) an order restraining the defendant from making contact with the victim, including an order forbidding the defendant from personally or through an agent initiating any communication likely to cause annoyance or alarm, including personal, written, or telephone contact with the victim, the victim's employers, employees, fellow workers, or others with whom communication would be likely to cause annoyance or alarm to the victim.

(c) A permanent criminal stalking injunction may be dissolved upon application of the victim to the court which granted the order.

(d) Notice of permanent criminal stalking injunctions issued pursuant to this section shall be sent by the court to the statewide warrants network or similar system.

(e) A permanent criminal stalking injunction issued pursuant to this section shall be effective statewide.

(f) Violation of an injunction issued pursuant to this section shall constitute an offense of stalking. Violations may be enforced in a civil action initiated by the stalking victim, a criminal action initiated by a prosecuting attorney, or both.

(g) Nothing in this section shall preclude the filing of a criminal information for stalking based on the same act which is the basis for the violation of the stalking injunction issued pursuant to Title 77, Chapter 3a, Stalking Injunctions, or permanent criminal stalking injunction.

ADDENDUM B

IN THE THIRD JUDICIAL DISTRICT COURT, SUMMIT COUNTY
SILVER SUMIT DEPARTMENT, STATE OF UTAH

ROBERT MALAN,	:	Case No. 030500557
	:	
Plaintiff,	:	
	:	
v	:	
	:	
KEVIN GATES,	:	
	:	
Defendant.	:	

STALKING INJUNCTION OCTOBER 7, 2003

BEFORE

THE HONORABLE BRUCE C. LUBECK

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
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1 SUMMIT COUNTY - OCTOBER 7, 2003

2 JUDGE BRUCE C. LUBECK PRESIDING

3 (Transcriber's note: Speaker identification
4 may not be accurate with audio recordings)

5 P R O C E E D I N G S

6 THE COURT: This is case #030500557. I've been
7 having trouble with my throat for the last few days so I
8 apologize. I never speak very loud but it's even worse now.
9 This is a stalking injunction matter of petitioner, Mr. Robert
10 Malan.

11 Am I saying that right, Malan?

12 MR. MALAN: Yes, Your Honor.

13 THE COURT: Have an ex parte injunction on September
14 11 and you are Mr. Gates?

15 MR. MOFFAT: This is Mr. Gates, Your Honor.

16 THE COURT: And represented by Mark Moffat and he
17 requested hearing apparently after being served on September
18 25. I think we tried to set this a bit earlier but I think Mr.
19 Moffat indicated this was the first available date.

20 MR. MOFFAT: That's correct, Your Honor.

21 THE COURT: And so we're here for an evidentiary
22 hearing. Anything either party needs to tell me?

23 MR. MOFFAT: Judge, at the outset I was just handed a
24 few moments ago a document that the victim witness coordinator
25 was nice enough to give me. It's a letter addressed to Your

1 Honor from an Allison Harrington as well as a letter addressed
2 to a person by the name of Annette by a person, Tom Aliprandy.
3 Both of those documents purport to address matters that are at
4 issue before this Court. Both of them constitute hearsay
5 evidence, Judge, and I object to the Court's consideration of
6 either of those documents.

7 THE COURT: Let me indicate that she handed them to
8 me and I read the first paragraph of the letter that has
9 Allison Harrington at the top and realized that she was
10 discussing the fact that I'm sorry I can't be there but I want
11 to tell you about some things and I didn't read any further.

12 The other letter from Tom Aliprandy, addressed to Annette,
13 I'm not sure who that is. It says attention, Jean Edens,
14 addressed to Annette. I didn't read that so I haven't
15 considered them and thought I would see what develops here and
16 see if they're to be considered at all.

17 Mr. Moffat, you oppose this stalking injunction?

18 MR. MOFFAT: Judge, I suppose - yes, we do oppose it
19 but in the alternative I suppose we may be asking the Court to
20 modify the stalking injunction. As it stands right now I
21 suppose that the Court has any one of a number of possibilities
22 at its disposal in addressing this particular matter. What we
23 would be asking the Court to do, if appropriate, would be to
24 modify the stalking order to a simple no contact order. Mr.
25 Gates would agree to have no contact with Mr. Malan, would

1 | agree to have no contact with Ms. Harrington, would agree to
2 | stay away from their place of residence and their mutual -
3 | well, stay away from his place of employment. However what the
4 | Court needs to be aware of is that Ms. Harrington currently
5 | works for Mr. Gates and has worked for him for some time.
6 | There has been some flexibility there in terms of, because of
7 | what she does she's able to do a lot of work through her home.
8 | This is a circumstance where Mr. Gates owns this business.
9 | It's a circumstance where his presence at the business is
10 | required and I would imagine that periodically her presence is
11 | required. Again, while there's been some flexibility in that
12 | lately, there's going to come a time I suppose as a practical
13 | matter where both of them are going to be on the site and it
14 | poses a problem. Our concern, Judge, is we would prefer a
15 | simple no contact order but there's a question in my mind as to
16 | whether or not petitioner can meet his burden today.

17 | THE COURT: Well, when I signed the ex parte order,
18 | of course, it based on the materials provided and I think since
19 | then I may have had a change of heart. Not on this case but
20 | generally. Mr. Malan listed several other people, Allison
21 | Harrington, Madeline Brooks and others and when I signed the
22 | order I listed those and I'm not sure why. The truth is, I'm
23 | not sure that I can do that. It seems to me that it may be
24 | that every individual has to get their own stalking injunction
25 | but that aside, I'm not sure what to call a no contact order.

1 Mr. Malan, I'll ask you your position on that in a moment.

2 But in essence what you're saying, Mr. Moffat, you
3 don't want is just something that says stalking?

4 MR. MOFFAT: Correct.

5 THE COURT: I mean, operating under the theory that I
6 don't want to be around anybody that doesn't want to be around
7 me, that's really all it is. It says he can't go to this
8 address on Loretta Way and 6670 South and 2220 East and you
9 can't have contact with Mr. Malan. It says he can't stalk him
10 but adjoined from going near the following addresses and then
11 no contacting directly or indirectly those named persons.

12 Let me start there Mr. Malan. Who are those persons?
13 Mr. Moffat just told me Ms. Harrington. Who are these other
14 people, Madeline Brooks, (inaudible) Malan?

15 MR. MALAN: That's everyone that resides at my
16 residence.

17 THE COURT: Are they brothers and sisters, family?

18 MR. MALAN: Family, one daughter, three sons and
19 Allison's other daughter and Allison.

20 THE COURT: And that address where you live is where,
21 which one of those?

22 MR. MALAN: The address in Sandy.

23 THE COURT: Loretta Way?

24 MR. MALAN: Correct.

25 THE COURT: These other addresses are employment or?

1 MR. MALAN: Yes. The addresses are the place of -
2 well, a day care, just anywhere where the children may be. It
3 was just designed to protect the family and Allison. Allison,
4 you know, after the incidents was terrified.

5 THE COURT: Let me first just inquire. I'll let you
6 speak if we get to that point.

7 So Mr. Moffat, you're simply saying that you don't
8 oppose - I'm not going to say I'm going to do this or I can but
9 an order similar to this can be in effect but just says not to
10 go to these places or contact these persons?

11 MR. MOFFAT: Right. I mean, Judge, it's the stalking
12 language that is problematic from a federal law point of view,
13 922-G specifically, and so we want to address that concern if
14 we're able. I think the Court has latitude in fashioning a
15 remedy under the statute that addresses stalking injunctions
16 there are any one of a number of things the Court can do. It
17 does not speak in terms of mandatory language and I would
18 submit that the Court would be perfectly within its right, if
19 appropriate, to order a no contact order. What I'm referring
20 to, Judge, is under 78-3A-1015 where it sets the parameters and
21 those parameters can thereafter be modified. Five deals with
22 the ex parte order the court issues and then at a hearing such
23 as the one we're about to have, the court has things it can do.
24 It can modify, and what we're asking is that the order as
25 drafted be modified and I think it addresses the concern quite

1 frankly that Mr. Malan likely has and it addresses a very
2 important concern that my client has as well.

3 THE COURT: Mr. Malan, again, what's your position if
4 I can do and if I would do such a thing, do you think that
5 gives you the protection you're seeking?

6 And I may call on Ms. Edens too, Mr. Moffat. Are
7 these, and I should know this and I'm sorry I don't, so Mr.
8 Malan first, are these put on the statewide network as a
9 stalking injunction? If it's not a stalking injunction then
10 it not be put on the statewide network?

11 MS. EDENS: Stalking injunctions are required to be
12 put on statewide. (inaudible).

13 THE COURT: So if it's called a no contact order or a
14 restraining order or something, that does not go on the
15 statewide network?

16 MS. EDENS: I believe you're right.

17 THE COURT: That's to my recollection.

18 Mr. Malan, what's your position? Do you think - and
19 I'm not trying to talk you out of anything. We can proceed if
20 you want to go ahead and testify. Do you think that gives you
21 the protection you want or would you like to ask for a stalking
22 injunction and I'll hear you and if I think you've met the
23 burden, I'll grant it. If I don't think you have, I won't.
24 It's sort of all or nothing thing or what's your view?

25 MR. MALAN: Your Honor, I would like to have the

1 protection of the state criminally if the injunction, however
2 it be worded, were violated. You know, the no contact thing is
3 certainly really what I want, however I do have some other
4 concerns where threats were made to ruin my life, these things
5 in a statement that you have not read but have been made and
6 where Ms. Gates and Mr. Romero were seen around my property.

7 MR. MOFFAT: Now Judge we're getting into situations--

8 THE COURT: Right.

9 Mr. Malan, I understand you, know, I'm not jumping on
10 you but I don't want to hear the evidence yet.

11 MR. MALAN: Okay.

12 THE COURT: But I'm just trying to see what it is you
13 want. I mean, if you feel that you want whatever protection a
14 civil stalking injunction protects and nothing less than that,
15 then I'll have you sworn and we'll go ahead but if you think
16 what he's proposing is sufficient, we can see if there's a way
17 I can do that but the answer - and I wouldn't expect you to
18 know this necessarily and I certainly don't, I don't know why
19 you would but I find that a lot of people know a lot of things
20 I don't know but whether we could make a violation of a no
21 contact order criminal is doubtful. I think the statute just
22 indicates that violation of a stalking injunction is an offense
23 but I don't think that a violation of something other than that
24 is a criminal violation.

25 MR. MALAN: Well then, Your Honor, I would like to

1 | pursue the stalking injunction. From my understanding there is
2 | no contact order anyway because of the criminal case so there
3 | are some other concerns that I do have that I would like it to
4 | be a criminal offense if it were broken and I would like it so
5 | there's no contact indirectly or directly.

6 | THE COURT: Okay. All right. Mr. Malan, why don't
7 | you step up and take an oath.

8 | ROBERT MALAN

9 | having been duly sworn testified upon
10 | his oath as follows:

11 | THE COURT: Step over here on the witness stand if
12 | you would.

13 | DIRECT EXAMINATION

14 | BY THE COURT:

15 | Q Your name is Robert Malan?

16 | A Yes, that's correct.

17 | Q And you're the petitioner in this case. On September
18 | 11 you filed a petition seeking a stalking injunction and you
19 | alleged that apparently earlier that same day, September 11th
20 | at 10:30 a.m. you had come contact with Mr. Kevin Gates?

21 | A Yes, Your Honor, it was the same day, September 11.

22 | Q And I'll just ask you a couple of preliminary things
23 | and then have you tell me what you observed on that day. Did
24 | you know Mr. Gates before September 11th?

25 | A I knew of him, I'd never met him.

1 Q You'd never met him. Okay. Tell me about what
2 occurred on September 11 that brought you to seek this civil
3 stalking injunction.

4 A Well, that morning Allison and myself-

5 Q Allison is Allison Harrington?

6 A Allison Harrington, Ms. Harrington. We were going to
7 her home to get a few things and we were going to go out of
8 town and about 15 minutes after we arrived at her home I walked
9 outside to get some stuff out of my car and Mr. Gates and
10 Romero pulled up into the driveway, basically just right in
11 front of the driveway, on the street and they both got out
12 stating a bunch of threats. Number one-

13 Q Who spoke?

14 A Mr. Gates spoke first and, you know, without the
15 language, get off my property. At that time I ran over -

16 Q Wait a minute. He said get off his property?

17 A Yes, sir.

18 Q Where were you when this happened?

19 A Allison has occupied this residence for several
20 months.

21 Q Where was this?

22 A Mr. Gates owns the property.

23 Q Where was it?

24 A 316 Park Avenue.

25 Q It's a home, residence, apartment? What is it?

1 A Yeah, it was Allison's residence. Allison and her
2 two daughters' residence and Kevin Gates owns the property and
3 allowed her to stay there, had agreed, you know, to let her
4 stay there. There was some sort of—

5 Q Okay. Stop please. So this was where she was living
6 and your understanding is Mr. Gates owns it?

7 A Yes.

8 Q You were there going where?

9 A We were just going to get some clothes from her home
10 so we could go out of town.

11 Q Another home than Park Avenue?

12 A No, that location.

13 Q You went there and Mr. Gates was there?

14 A Yes. He'd been —

15 Q When you came outside?

16 A Yeah. When he came outside —

17 Q What did Mr. Gates say to you?

18 A He said basically get off my property.

19 Q Okay. As best you recall, I realize you can't quote
20 but—

21 A A lot of obscenities that I don't want to say in
22 court.

23 Q Okay. Get off the property. What else did he say?

24 A "I'm going to kill you."

25 Q And you'd never seen him before?

1 A I'd seen him from a distance, I'd never met him. I
2 knew he was. I recognized him.

3 Q Okay. What else did he say to you? I think you said
4 this person named Romero was with him. Did you know this Mr.
5 Romero?

6 A Never seen him before in my life.

7 Q You said his name. You learned it later I take it?

8 A Yes, I did, didn't know his name.

9 Q Okay. And was that a close discussion?

10 A No, they were running at me at that point. I started
11 running at that point and said - the only words that I said
12 during this whole thing were "Kevin, don't do this." And I
13 tried to run - I ran over to the neighbor's and tried to get up
14 this rock wall to get away and Mr. Romero cut me off. They
15 both came down and cornered me into the neighbor's driveway
16 against their car and proceeded to assault me, you know. Kevin
17 was trying to get me to fight back.

18 Q What did Mr. Gates do or say?

19 A He accused me of a lot of things that-

20 Q What?

21 A Saying things about him. I don't know, just stupid
22 things.

23 Q What do you recall he said?

24 A You know, why did you say this or that. You know
25 everything happened so quickly, none of it really made sense to

1 me. The only thing I can recall that made sense was he thought
2 I - a friend that I know, a girl, he accused us of trying to
3 set him up in some way.

4 Q You said he assaulted you. What did you mean by
5 that? What do you say he did?

6 A They were kicking, slapping, hitting.

7 Q They, meaning both?

8 A Yeah, mostly Mr. Romero but both. They both, you
9 know, continued the threats, saying "Just say one word and I'll
10 kill you", you know, just a lot of verbal threats and Romero
11 was trying to kick, you know, kick my knees out and, you know,
12 a lot of open handed slaps to the ears, nose, face.

13 Q Okay. How long did that go on there?

14 A It seemed like a long time but a couple of minutes I
15 guess.

16 Q How did that end? You said you were kind of trapped
17 in the corner. How long did that incident happen there?

18 A It happened for a while. Allison came out and my
19 daughter -

20 Q And your daughter is who?

21 A My daughter, Brinlin.

22 Q How old is she?

23 A She's four years old, came out and she was screaming.

24 Allison came and tried to get in between us, get them off and
25 they just kept pushing her away. Finally some neighbors yelled

1 through a window to quit it or they'd call the police and
2 that's when I said, "Call the police."

3 Q Okay. What happened then?

4 A They continued a little bit. Kevin walked over and
5 tried to talk to Alli and-

6 Q Alli is Allison?

7 A Allison. And Romero continued to hit me for maybe
8 another 30, 40 seconds. By then several neighbors were out
9 there yelling at them, you know, basically calling them names
10 for doing what they were doing and so they got in their car and
11 left.

12 Q They meaning Mr. Gates and Romero?

13 A Romero and Gate got in their car and left.

14 Q Did the police arrive?

15 A They caught them down the street. About half way
16 down the street they caught them and arrested them.

17 Q All right. Were there any other contacts on that day
18 or any other day you had with Mr. Gates?

19 A Not personally with me. There's some other incidents
20 that are referenced both in the police report and in other
21 statements. My neighbor had made a statement and faxed that to
22 Officer Ellis and to Jeannie that day stating that-

23 MR. MOFFAT: Objection.

24 Q (BY THE COURT) Don't - it's called hearsay Mr. Malan
25 and for now I'm going to sustain the objection. Without

1 telling me what someone else said, did you have any other
2 contact with Mr. Gates?

3 A Not personally, no. I do have a threat in text that
4 he made—

5 MR. MOFFAT: I'm going to object to that too, Judge.

6 Q (BY THE COURT) He said a threat in text. You've
7 got—

8 A He sent a text message to Allison referring to me.

9 MR. MOFFAT: I'm going to object to it, Judge.

10 Q (BY THE COURT) Well, let's see if we can - don't
11 tell me about anything it says Mr. Malan but Ms. Harrington
12 gave you something or showed you something or told you
13 something or what?

14 A Yeah. While we were filling out these reports, the
15 stalking injunction, police reports, he was released from jail
16 and immediately sent a text message to Allison.

17 Q Did you see it?

18 A Yeah.

19 Q Don't tell me what it said.

20 A Yeah.

21 Q Did you see it?

22 A I did see it.

23 Q And this was on the 11th?

24 A Yes.

25 Q What time roughly, when you were filling out this

1 | petition for the injunction?

2 | A Yes, Your Honor. I believe it was 1:46.

3 | Q And where were you when you got this message?

4 | A At the kitchen table filling out reports.

5 | Q And she, meaning Allison Harrington, this came on the

6 | phone screen?

7 | A Yes.

8 | Q And she showed it to you?

9 | A Yes.

10 | Q How do you know it was from Mr. Gates?

11 | A Because it had his name. When you send a text

12 | message it either has the number it comes from or the name that

13 | was entered into the phone associated with that number. The

14 | message was to me.

15 | MR. MOFFAT: Did it said Robert? What did it say?

16 | THE WITNESS: Well.

17 | MR. MOFFAT: What did it say?

18 | THE WITNESS: What did it say?

19 | MR. MOFFAT: What did it say?

20 | THE COURT: Mr. Moffat, I'll note your objection.

21 | What did the message say?

22 | THE WITNESS: It said son-of-a-bitch, that was his

23 | warning.

24 | Q (BY THE COURT) All right. Any other contacts you've

25 | had with Mr. Gates?

1 A No, sir.

2 Q And this person you've identified as Romero, you'd
3 never seen or met him before?

4 A No, sir.

5 Q But you've since learned that that was his name?

6 A Yes.

7 Q And Ms. Harrington today is I assume this letter that
8 was given me explains - she's not here?

9 A She has been advised not to be here based on her
10 mental health.

11 MR. MOFFAT: Judge -

12 Q (BY THE COURT) Okay. She's not here in any event
13 and this letter explains why?

14 A Yes.

15 Q There's five pages in here. Why can't I find one?
16 All right. Okay. Anything else that you, Mr. Malan, you can
17 tell me from your own personal knowledge of contacts you had
18 with Mr. Gates?

19 A Not based on hearsay or other people's knowledge?

20 Q Right, not based on what anybody else has told you.

21 A No sir. Can I, I guess, give you an explanation of
22 why based on-

23 THE COURT: Probably not.

24 MR. MALAN: Okay.

25 THE COURT: Mr. Moffat?

1 MR. MOFFAT: Judge, I don't have any questions of Mr.
2 Malan.

3 THE COURT: All right. Thank you Mr. Malan, you can
4 step down.

5 MR. MOFFAT: Well, Judge, if I may?

6 THE COURT: Well, I guess there is.

7 CROSS EXAMINATION

8 BY MR. MOFFAT:

9 Q Mr. Malan, prior to this date, Mr. Gates had never
10 contacted or spoken to you, correct?

11 A No, sir.

12 Q And prior to this date Mr. Malan had never contacted
13 or approached or talked to you at your place of employment,
14 correct?

15 A Mr. Gates, no.

16 Q He had never talked to or spoken to your children,
17 correct, to communicate threats or anything like that?

18 A He's spoken to one of my children but no, not to
19 communicate threats.

20 Q This text message that you've described, was a text
21 message that came up on Ms. Harrington's phone, correct?

22 A Yes.

23 Q It did not come up on yours?

24 A Correct.

25 Q It was some sort of message directed to her and not

1 to you, correct?

2 A No sir, it was directed to me.

3 Q Didn't reference you, did it?

4 A Yes, it did reference me.

5 Q Did it reference the name of Rob Malan?

6 A No, it didn't reference my name.

7 Q But for what you've described you have no way of
8 knowing where that text message came from; isn't that correct?

9 A Oh yeah, I know exactly where it came from. It's
10 very clear in the phone where it came from.

11 Q But from what you've described, you had no
12 independent evidence to corroborate where it came from; isn't
13 that correct?

14 A I have the phone and, yes, he can corroborate the
15 evidence.

16 Q You don't have that today though do you?

17 A Yes, I do.

18 MR. MOFFAT: That's all I have, Judge.

19 THE COURT: Maybe I will ask a couple more questions.
20 I don't deal with these high tech things.

21 REDIRECT EXAMINATION

22 BY THE COURT:

23 Q A text message, there's a phone screen and it reads
24 what you've described? It says hello or whatever it says?
25 That's what a text message is?

1 A Yes. You punch it in, punch in the numbers from the
2 keypad.

3 Q Okay. And it identified - and how does it identify
4 where it's from?

5 A It identifies the number that it comes from. So just
6 as if you had a cell phone and you programmed a bunch of
7 numbers into that with names, that correlated to names, if
8 somebody from that number would call you, it would say you
9 know, if your friend Mark were to call you, it would say Mark.
10 If you didn't have the Mark correlated to the name it would
11 just have the number. So this came as Kevin which in the
12 directory correlates to the number.

13 MR. MOFFAT: Judge, if I may. I'm not sure that
14 there's been appropriate foundation laid for this testimony.
15 This appears to be, Judge, getting into the realm of what I
16 would consider to be expert testimony regarding the way that
17 these machines function, regarding how it is that they display
18 the information that purportedly is on the screen and absent
19 some foundation that I would submit to the Court that Mr. Malan,
20 would have to establish, I think it's inappropriate for him to
21 be offering this expert testimony and opinion.

22 THE COURT: All right. Mr. Malan, thank you. I've
23 heard enough in that regard.

24 Q (BY THE COURT) Let me ask you about Allison
25 Harrington. What is your relationship with her? How long have

1 you known her?

2 A I've known her for five years. We have a child

3 together.

4 Q And that child is?

5 A Brinlin Malan.

6 Q That's Brinlan?

7 A Brinlin, correct.

8 Q Okay. And she has that child, custody of that child?

9 A We both do.

10 Q You were never married to Ms. Harrington?

11 A We were never married.

12 Q Okay.

13 A We lived together for a year.

14 Q These other children, Madeline, that is?

15 A That's her other child from a different father.

16 Q And Jadene, Cash and Cardin Malan are?

17 A Are my sons.

18 Q Not from—

19 A From a previous marriage.

20 Q Not with Ms. Harrington?

21 A Correct.

22 Q And you heard Mr. Moffat earlier reference that Ms.

23 Harrington apparently works either with or for Mr. Gates?

24 That's your understanding, she works for his company?

25 A Yes. She's been allowed to do her work at home, has

1 been asked to start coming to the office that has been strongly
2 advised by her doctor not to have any contact.

3 MR. MOFFAT: Judge, I guess—

4 THE COURT: I'm not considering that. Okay. Mr.
5 Malan, anything else you think you need to tell me?

6 THE WITNESS: Just that you know, much of the
7 information I do have is hearsay, people that are not here but
8 could be subpoenaed to appear, that strongly give me the
9 feeling I need protection.

10 THE COURT: Okay. I understand. I'm not trying to
11 cut you off in that regard but I don't think the rules allow me
12 to hear that kind of summary, if you will, Mr. Malan but I
13 understand what you're saying. There are other people who have
14 knowledge that you think would be helpful for me to hear.

15 THE WITNESS: Correct, and based on the police report
16 and (inaudible) fear for my safety.

17 THE COURT: All right. Thank you. Anything else Mr.
18 Moffat?

19 MR. MOFFAT: Just a couple of questions.

20 RE CROSS EXAMINATION

21 BY MR. MOFFAT:

22 Q Mr. Malan, at the time - this happened on September
23 11 of this year and at that time Ms. Harrington resided at this
24 address in Park City, correct?

25 A Correct.

1 Q And the two of you hadn't lived together as a couple
2 for some time; isn't that correct?

3 A Correct.

4 Q It had been what, more than a year if I'm not
5 mistaken; isn't that correct?

6 A Correct.

7 Q You had mentioned that Mr. Gates was making
8 statements to you about things, accused you, I think you said
9 of setting him up through another person that you know,
10 correct?

11 A Correct.

12 Q A person that deals drugs; is that correct?

13 A No, that's not correct.

14 Q Okay. Who was that person he was referring to?

15 A A person, her name is Michelle. She-

16 Q What's her last name?

17 A Don't even know her last name.

18 Q You don't.

19 A It's just not in my mind right now.

20 Q Okay. Did he also accuse you of approaching his son
21 about drugs and did he raise that issue with you in the context
22 of this situation that was occurring as you described?

23 A Yeah, after the neighbors pursued him for the things
24 he was doing, he said, he's a drug dealer, you know and he told
25 the police officers that as well and there's never been any

1 | contact with his son concerning drugs.

2 | MR. MOFFAT: That's all I have, Judge.

3 | THE COURT: All right. Mr. Malan, thank you, you can
4 | step down.

5 | Mr. Moffat, do you have any evidence to present? Let
6 | me tell you so you don't feel, if you will -

7 | MR. MALAN: Your Honor, can I make just one more
8 | statement? I just want you to know that I can show you this
9 | text message if that would be important. I do have it here.

10 | THE COURT: Do you have the telephone that it can be
11 | brought up?

12 | MR. MALAN: I have the telephone and the message in
13 | it. It's been saved since that moment.

14 | MR. MOFFAT: Judge, there's a chain of custody issue
15 | with respect to that particular item and the person who owns
16 | the phone is not here to testify.

17 | THE COURT: Okay. Thank you Mr. Malan, I'll reject
18 | that offer. I heard your testimony.

19 | Let me tell you, Mr. Moffat, where I am in your
20 | decision on whether you're going to put on any testimony. I
21 | think that his testimony does show a course of conduct. I am
22 | accepting that the conduct he's described as stalking,
23 | repeatedly means twice and accepting the first incident that
24 | he's described in some detail and then the message, which I'm
25 | giving credence to and enough foundation that in my view of

1 common sense and his indication that it came from Mr. Gates,
2 I'm crediting that and so I think that's repeated contact and I
3 am ruling on that basis to issue the stalking injunction. I'd
4 be glad to hear from - I didn't want you to think my thinking
5 was maybe otherwise and say you don't want to present anything.
6 I'm not telling you have to. I would weigh it and if my
7 credibility determinations are such I would change my mind on
8 that but based on what he's presented, I think I would issue
9 it.

10 MR. MOFFAT: Judge, because of the pendency of the
11 criminal charges in this matter, we're not at liberty to have
12 Mr. Gates take the stand and testify as you can understand. I
13 do want to argue to the Court if I may -

14 THE COURT: Sure.

15 MR. MOFFAT: - that what we're dealing with here is
16 really one episode, one occurrence. Even if you consider this
17 text message, it is something that occurred during the day.
18 Now my issue, Judge, here is what we've heard a lot about is
19 testimony that occurred at the home. That is clearly one
20 occurrence, Judge, and but for the text message, I would submit
21 it is the only evidence that the Court has of an occurrence.

22 THE COURT: I agree.

23 MR. MOFFAT: The text message itself, Judge, whether
24 or not - what is the text message? I mean clearly it basically
25 said tell your bitch that's his warning. That's all it said.

1 If you accept the foundation, if you accept the - if you think
2 that the foundation for that testimony is appropriate, that is
3 all that the message says and for it to be actionable under the
4 stalking injunction statute, Judge, that has to constitute a
5 threat and I would submit to the Court that it does not
6 constitute a threat. It merely, if you accept the fact that it
7 came from Mr. Gates and I submit to the Court that there is
8 ample questions as to whether or not it did, I would submit to
9 the Court that that isn't a kind of threat that would - it's
10 not a threat to begin with, nor is the kind of statement that I
11 think would be appropriate for the Court to consider as a
12 threat as defined under the statute.

13 What we're dealing with here, Judge, is evidence of
14 one single occurrence and that occurrence is what occurred on
15 September the 11th at the Park Avenue address. That is it.
16 All of this occurred in one location. It occurred within
17 hours, if you're taking into consideration the text message,
18 within a very short time of the altercation and we're talking
19 about something that happened on one particular day. That is
20 it and I would submit that that is insufficient for the Court
21 to issue a stalking injunction in this case.

22 If the Court is inclined to issue a stalking
23 injunction what we're dealing with here, Judge, is in essence
24 evidence of a one-time occurrence, something that happened on
25 one particular day and I would submit that if you're inclined

1 | to issue an order in this case that the order need not prohibit
2 | stalking per se. Under the statute, Judge, you have the
3 | ability to issue orders of any kind. You could call it a
4 | stalking injunction and it can prohibit contact of any kind
5 | between Mr. Gates and Mr. Malan. Now I question whether or not
6 | he is able under the statute to seek to have Ms. Harrington
7 | drawn within the -

8 | THE COURT: She won't be. I wouldn't issue it on her
9 | behalf. If she feels she needs some protection, she'll have to
10 | get one.

11 | MR. MOFFAT: What we would ask that the Court do,
12 | Judge, rather than prohibit - I mean, if you look under the
13 | statute, what 76-38101 prohibits - allows the Court to order is
14 | any one of a number of things under paragraph 5; may be
15 | enjoined from committing stalking and, Judge, again, committing
16 | stalking I think in assessing the propriety of that particular
17 | order, even if the Court is of the view that we're dealing with
18 | conduct by way of what occurred at the address as well as this
19 | text message, I mean, that's the extent of the conduct that the
20 | Court has before it. I would question the need for an order
21 | that prohibited stalking. If the Court has concerns about
22 | further contact between Mr. Gates, Mr. Malan, and member of his
23 | immediate family, then a no contact order under the Brubreck
24 | stalking injunction may be appropriate and under such an order
25 | Mr. Gates would be prohibited from having contact with Mr.

1 Malan, members of his family. In the second paragraph he could
2 even go so far as to order that he not go to his place of
3 employment. Again, it's a place that Mr. Gates has never been
4 but if the Court feels that that somehow or another, that the
5 no contact provisions of the stalking injunction that I
6 proposed were not enough, then I suppose it could include
7 addresses, the place of residence, the place of employment but
8 again, my view is, Judge, that the evidence is insufficient
9 today to meet the requirements of a finding of stalking. But
10 in the alternative if the Court is inclined to issue an order,
11 we would ask that the order include a no contact provision
12 under the heading stalking order but not include the language
13 dealing with stalking. Because, quite frankly Judge, we're
14 dealing with episodes of one day, September 11 and I don't know
15 that such a provision would be appropriate or necessary.

16 THE COURT: Thank you. Let me explain my thinking a
17 little bit. I do think it's appropriate. I do give credit to
18 what Mr. Malan had to say and I do view them as different
19 incidents; them meaning the contact at the house and the later
20 text message. Mr. Malan described that he hadn't met Mr. Gates
21 before and so the text message that came in at 1:45 or
22 something after this incident by a few hours, allegedly this
23 occurred at 10:30, would be a second incident and it refers, it
24 says "that was his warning", meaning the only thing it could
25 refer to is that which happened at 10:30 and I viewed that

1 | second contact as sufficient to fit within the definition of
2 | 76-5-106.5, conveying a threat implied by conduct or a
3 | combination thereof directed toward a person. So I think
4 | that's sufficiently broad to consider that text message as a
5 | second, therefore repeated occasion and so I find that the
6 | petitioner has made out stalking. But I agree with you that in
7 | some ways the statute is sort of oddly worded because to enjoin
8 | stalking means I enjoin two or more contacts and what I really
9 | intend to enjoin is no more contact. That is to enjoin
10 | stalking doesn't enjoin one more contact because by definition
11 | stalking is two contacts at least. So I will issue a stalking
12 | injunction and let me make sure I have - I want to get these
13 | addresses right and make sure what they are and what I will
14 | enjoin - and the way I want the order worded and we may have to
15 | just use the form and cross some things out is under 77-38-101
16 | Sub 5, Mr. Gates is restrained from coming near the residence
17 | and that's Loretta Way?

18 | MR. MALAN: Correct.

19 | THE COURT: Place of employment. These addresses
20 | again, 6670 South, that's what?

21 | MR. MALAN: That's my child's daycare.

22 | THE COURT: Brinlin or Jadine or Cash?

23 | MR. MALAN: Correct.

24 | THE COURT: Mr. Malan, what I have in mind is I think
25 | I can issue this on behalf of you and your children, not on

1 behalf of Madeline and whatever her last name was and Allison.
2 So is this an address that you or your children go to or is it
3 one that -

4 MR. MALAN: Yeah, one of my children Brinlin Malan,
5 who is my child, does go there.

6 THE COURT: And the 2220 East?

7 MR. MALAN: Correct. There is two places that she
8 goes to.

9 THE COURT: Two day cares or something?

10 MR. MALAN: Yeah. One daycare and one basically a
11 babysitter.

12 THE COURT: And I don't have an address of your
13 employment but I did see somewhere it's starts with an 'N'.
14 What is it?

15 MR. MALAN: Novardas.

16 THE COURT: Novardas. So Mr. Gates is restrained
17 from going to or contacting your place of employment and these
18 schools of your children. You're not to contact, Mr. Gates,
19 directly or indirectly Mr. Malan in anyway, phone, writing, his
20 employer in any way...

21 MR. MALAN: Your Honor, can I make one other comment?
22 Allison would have filed one of these on her own behalf at the
23 time but based on these circumstances, she now resides at my
24 residence so everyone listed lives at my residence and -

25 THE COURT: Well, he's enjoined from going to that

1 residence but as far as - I mean, it seems to me that she's got
2 a serious problem if she works where he works. I can't enjoin
3 him from going to his work.

4 MR. MALAN: We just were told that, you know, if she
5 lived at the residence that she would be protected under this
6 injunction based on her living at my residence.

7 THE COURT: She's protected there. He's not to
8 contact or go near your residence but again, if she feels she
9 needs something else for her employment or schooling or
10 wherever else she may go, she's going to have to deal with
11 that, I think, in another fashion.

12 All right. Let me see if there's anything else I
13 think I need to do. I don't think so. I'm going to ask Mr.
14 Moffat and Ms. Eden to prepare an order and maybe sit down with
15 you briefly and make sure you think it reflects what I said
16 here today.

17 MR. MALAN: All right.

18 THE COURT: And if need be, I'll just simply write it
19 up but we have forms that we normally use in these matters that
20 I think we'll be able to cross out and write in sufficiently.
21 But I'll be around until five.

22 MR. MOFFAT: Can Mr. Malan - just in the interest of
23 clarity, the address for his place of employment so that
24 there's no inadvertent - I mean, I want to make sure I know
25 where it is and Mr. Gates knows where it is so we don't violate

1 the order inadvertently. I don't know the address of it.

2 THE COURT: Mr. Malan, do you have a problem with
3 that?

4 MR. MALAN: What I would like is just that there be
5 no contact with anyone with no - it's a company that's based
6 out of New Jersey. So I'm not really worried about him going
7 there.

8 THE COURT: You don't have an office?

9 MR. MALAN: I don't have an office locally, no. You
10 know, he's made some ridiculous allegations. I just don't want
11 him to, you know-

12 THE COURT: Let's just-

13 MR. MALAN: -try to contact-

14 THE COURT: - no contact with Mr. Malan's employer
15 Novardas. I think that representative of Novardas. I think
16 that's probably all we can do under the circumstances.

17 MR. MOFFAT: So it's no contact with the addresses
18 and the individuals but for Ms. Harrington and one other
19 individual?

20 THE COURT: Her daughter. I'm not listing her
21 daughter, Madeline, was it on there but the address is listed.

22 MR. MOFFAT: Thank you, Judge.

23 MR. MALAN: Thank you, Your Honor.

24 THE COURT: All right. Thank you and again, I'll be
25 around if you can visit with Ms. Eden for a minute and Mr.

1 Malan, why don't you stay here in the courtroom and Mr. Moffat
2 maybe you can...

3 (Whereupon the hearing was concluded)

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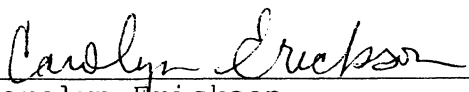
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CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearing held before Judge Bruce Lubeck was transcribed by me from a CD recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed this 6th day of December, 2003 in Sandy, Utah.


Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber

My Commission expires May 4, 2006

